BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHIRLEY SIMMS	)	
Claimant	)	
VS.	)	
	)	Docket No. 192,861
DILLON LIVING CENTER	)	
Respondent	)	
AND	)	
	)	
SELF INSURED	)	
Insurance Carrier	)	

ORDER

Claimant appeals from a November 15, 1994 Preliminary Hearing Order by Administrative Law Judge George R. Robertson.

ISSUES

The Administrative Law Judge denied claimant's request for preliminary benefits by finding that the condition complained of by the claimant is not related to her employment activities. The finding by the Administrative Law Judge relates to the issue of whether claimant suffered personal injury by accident arising out of and in the course of her employment. Claimant, in her Application for Review, states that:

"The specific issues claimant wishes to address are as follows:

1. [Whether] [t]he claimant's injury of 05/18/94 arrives (sic) out of and in the course of her employment.

2. Did claimant give timely notice to respondent as required by KSA 44-520?

3. Is claimant entitled to temporary total disability benefit[s] from and after May 26, 1994?

4. Is claimant entitled to medical expenses?"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Appeals Board has jurisdiction to review a finding regarding a disputed issue of whether the employee suffered an accidental injury which arose out of and in the course of the employee's employment. K.S.A. 44-534a.

The facts of this case are that the claimant first began work for the respondent as a certified nurse's aide on or about the first of February 1994. At that time, she had lumps in both breasts which were not related to her employment activities. Biopsies were done on March 3, 1994, and claimant returned to work on March 7, 1994. She continued to perform her regular duties but certain activities, particularly lifting, caused her to experience some aggravation of pain and swelling around the areas of her biopsies.

On May 18, 1994, claimant was attempting to assist a large female resident onto the toilet when the resident fell. Claimant tried to grab the resident to keep her from falling. All of the resident's weight was shifted onto claimant's arm, resulting in a strain to her right side. Claimant notified the director of nursing about the accident and was advised that she could either go to the hospital emergency room or go home. However, since they did not have anyone to replace her, claimant was asked to stay and work until things slowed down. Claimant took Tylenol and endured her pain and discomfort until it was time for her to go off work. She first went to the hospital emergency room but it was so crowded that she decided to just go home and see her own doctor.

Claimant was off work the next day. She already had an appointment the following day to see her personal physician because of symptoms she had been experiencing with pain and swelling around the area of her biopsies. Dr. Dexter's notes of May 20, 1994, reflect that claimant complained of straining her right side and breast area when attempting to catch a resident. Dr. Dexter recommended claimant apply hot packs and suggested that she should take it easy for five days. Claimant returned to work on May 24th and 25th and the swelling became worse. On May 26th, her right arm was hurting so badly that she could barely lift it. She again contacted Dr. Dexter who advised her to do no lifting until he could see her on May 29th. Dr. Dexter was apparently unavailable on that date and claimant's appointment was rescheduled for June 2, 1994. Dr. Dexter's secretary instructed claimant that she should not work until that examination.

Claimant saw Dr. Dexter on June 2, 1994, at which time he released her to return to work with a ten (10) pound maximum weight lifting restriction. On that same date, claimant met with her supervisor to inform her of the physician's restriction, at which time she was terminated for allegedly failing to report her absences.

Claimant bears the burden of proof to establish her claim. "Burden of proof" is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

> ". . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

Following the Preliminary Hearing, Administrative Law Judge George R. Robertson found ". . . that this trier of fact is unpersuaded that the condition complained of by the claimant is related to her employment activities."

In order to recover, the claimant must establish she has sustained a personal injury by accident arising out of and in the course of her employment. K.S.A. 44-501(a). "Personal injury" is defined in K.S.A. 44-508(e) as:

> ". . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living."

The terms "injury" and "accident" are not synonymous. Each must be established by the claimant. An "accident" is ". . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force." K.S.A. 44-508(d). An accident is an event which causes an injury. The injury is a change in the physical structure of the body which occurs as a result of the accident. Barke v. Archer Daniels Midland Co., 223 Kan. 313, 317, 573 P. 2d 1025 (1978).

Further, the claimant must establish that she has sustained an accident and injury arising out of the employment and in the course of the employment. These are separate elements which must be proven in order for the claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973). In order to establish that the incident "arose out of the employment", the claimant must show that there is some causal connection between the accident, injury and the employment. To do this, it must be shown that the injury arose out of the nature, conditions, obligations and incidents of the employment. Only risks associated with the work place are compensable. "In the course of the employment", relates to the time, place and circumstances under which the accident occurred, and that the injury happened while the employee was at work at his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

The Kansas Supreme Court has ruled that it is not necessary for the injury to be caused by trauma or some form of physical force to be compensable. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 379, 573 P.2d 1036 (1978). Personal injury or injury results from an accident which can occur in a single event or from a series of events which occur over time. The event or events do not have to be traumatic or manifested by force. Rather, an accident can occur when, as a result of performing his or her usual tasks in their usual manner, the employee suffers an injury. Downes v. IBP, Inc., 10 Kan. App. 2d 39, 41, 691 P.2d 42 (1984), rev. denied 236 Kan. 875 (1985). Also, it is well settled in this State that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction. Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984). Demars v. Rickel Manufacturing Corporation, *supra*; Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

Claimant's testimony is uncontroverted that her work activities aggravated the area of her previous biopsies, causing pain and swelling to occur. The incident on May 18, 1994, clearly served to intensify this condition as is supported by the clinical notes of Dr. Dexter. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

(2) Whether claimant gave timely notice as required by K.S.A. 44-520 was not addressed in the Order of the Administrative Law Judge. Accordingly, there is no finding with regard to a disputed issue of whether notice was given. There is then no finding to review nor from which an appeal can be taken and the Appeals Board cannot therefore consider the question of notice at this time.

(3) & (4) Whether claimant is temporarily totally disabled or in need of medical benefits are not issues over which the Appeals Board has jurisdiction in an appeal from a preliminary order. K.S.A. 44-534a and K.S.A. 44-551.

Having found, based upon the evidence and record as it now exists, that claimant has met her burden of proving accidental injury on May 18, 1994, with subsequent aggravation each day worked until May 25, 1994, and that said injury arose out of and in the course of her employment with the respondent, this case should be remanded to the Administrative Law Judge for further findings consistent with this opinion.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the November 15, 1994 Order of Administrative Law Judge George R. Robertson be, and is hereby, reversed and remanded to the Administrative Law Judge for further proceedings and order consistent with this opinion.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Attorney at Law, Hutchinson, KS
Scott J. Mann, Attorney at Law, Hutchinson, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director